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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 187

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL POWER COMMISSION, EL PASO NATURAL GAS COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Reply Brief of Petitioner to Briefs for the Federal Power Commission and the El Paso Natural Gas Company in Opposition

In accordance with Rule 24(4) of the Revised Rules of the Supreme Court of the United States, the petitioner, the People of the State of California, submits this brief in reply to the brief for respondent Federal Power Commission (Commission), and to the brief for respondent El Paso Natural Gas Company (El Paso), in opposition to California's Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ARGUMENT

The basic conflict in the administration and enforcement of the Clayton Antitrust Act and the Natural Gas Act which inheres in this case presents an opportunity to the Court to provide definitively precise standards for the guidance of the interstate natural gas pipeline industry. If the decision of the Court of Appeals is not reviewed, the Commission, the Department of Justice, industry, and industry's consumers will be faced with the problem of not knowing what course may be safely pursued in order to achieve mergers of companies such as El Paso and Pacific Northwest.

I.

THE NATIONAL IMPORTANCE OF THE ISSUES PRESENTED

The current economics of the business community place the issues of this case in critical position. There has been and is now a consistent and ever-increasing pull toward mergers and consolidations. Business decisions toward merger are made at an ever-increasing rate, and are not confined to the unregulated segment of the American business sector. Accordingly, it is critical that merger judgments predicated upon cost savings, increased efficiency, or other considerations must also be measured in terms of lawfulness and in terms of the effect of such mergers upon existing competition or monopoly. Mergers cannot be determined to be in the public interest absent an awareness of their status under the monopoly statutes.

The problem posed in the instant case is correctly characterized by the Government as unique. It is incorrectly described by the Government as being of a non-recurring nature. The very clash of jurisdiction concerning monopoly questions has been the subject of contemporary dispute between the Department of Justice and federal agencies.

Precedent and authority in this field are in a state of evolution lacking resolution and will continue to be so until a conclusive answer is pronounced by this Court.

California cannot cite to the Court as evidence of the broad impact of the problem before it other than the reported news concerning the controversies presently existent between the Department of Justice and its view of the monopoly statutes, the Controller of the Currency and his view of the monopoly statutes, and, as arbiter, the United States District Court, or the federal judiciary. On Thursday, August 31, 1961, the business and financial pages of the New York Times reported a dispute not unlike the present case, wherein lawyers from the Department of Justice sought to block the merger of the Continental Illinois Bank and Trust Company of Chicago and the City National Bank and Trust Company of Chicago. The Justice Department in that case, it was reported, made the argument that if such a merger—which had previously been approved by the Controller of the Currency—were not restrained, it would be extremely difficult to untie the merger and that there would be the almost unsolvable problem of identifying assets and of trying to unscramble assets after merger. At issue in this case was Section 7 of the Clayton Act.

California is advised by press reports (The Washington Post, Wednesday, August 30, 1961, Business Section, Page B 11), that this is the fourth such instance of a clash concerning the authority of the Controller of the Currency as against the views of the Antitrust Division of the Department of Justice to pass upon the lawfulness of a bank merger. This quarrel over authority and the dichotomy of jurisdiction which permits decisions lacking finality are a cause of confusion and concern to the business community, to the federal agencies, to the Department of Justice, to the fed-

eral judiciary, and—above all—to those members of the public affected by a business transaction, of short or long duration, which may ultimately be found to have, in fact, operated illegally.

The warring assertions of authority are becoming common. As far back as April 14, 1961, the New York Times reported those instances of conflict between the Federal Reserve Board, the Treasury Department and the Controller of the Currency, the Attorney General of the United States and the Department of Justice, and the Federal Deposit Insurance Corporation, relating to the mergers of banking corporations. The article, which is set forth in full in Appendix "B" herein, characterized the situation in this fashion:

> "The agreement with the Controller has drawn no public challenge so far, but it would not surprise officials here if it did. There is general agreement that a sloppy situation had developed, where mergers were being approved by one agency of the Government and quickly knocked down by another."

In this very case, in the court below the Department of Justice and the Solicitor General took the position that "The decision of the Federal Power Commission should be vacated and the cause remanded, with instructions that the Commission either deny the application or await the outcome of the antitrust litigation." While California cannot seek review based upon a conflict between two lower jurisdictions, it can at least offer to the Court as a basis of review the division of opinion and the inconsistency which exist between the present position of the Department of Justice and that previously taken below in the Court of Appeals.

It is important, in order to know presently and to be apprised of whether transactions are lawful or unlawful, that this Court should grant the petition herein.

The position of the public is critical in cases such as here. It may well be—and it is California's position that such is the case—that we are operating and being affected by a combination which violates the Clayton Act and which is, accordingly, unlawful. This is now only a contention, we concede, but it can be argued that it is a contention which may become the reality, assuming a successful prosecution of the court action of the Department of Justice. Assume a judgment is rendered in favor of the Government by the Federal Court, in which event, upon the date of such judgment and its finality, California and the other customers of El Paso and Pacific will be found, in retrospect, to have been served for a period of years by a business combination determined to have been illegal at all times.

The reasons for such a conclusion will no doubt come from proof of unlawful corporate conduct and actions, the consequences of which will have been visited upon the Western United States beyond effective recall. Just as in the bank merger cases, the remedy then available to California, because of the commingling of assets and properties, may well make any remedies the Government seeks impractical, if not impossible. At the least, they will be more difficult than if the merger approval given by the agency here had properly awaited determination by the court. And ironically, whatever harmful consequences or difficulties follow from administrative approval of a merger ultimately found to be unlawful will all have been unnecessary if only the authority of the federal courts to determine violations of the Clayton Act had been deferred to and respected in the first instance.

II.

THE UNREALITY OF COURT RELIEF

The Department of Justice is being less than realistic in stating that the issue of unlawful monopoly remains open for litigation in the District Court action in Utah, despite the decision of the Federal Power Commission. Such a statement does not stand the test of the practicalities of the law. The Government cannot, on the one hand, in this appeal support the merger upon its own selective grounds by makeweight rationale and, at the same time, preserve its legal right to attack this merger when the trial of the matter comes on before the court. The Government in its brief is defending the decision of the Federal Power Commission and is making its role as enforcer of the Clayton Act an impossibility. It need only be said that the Government's present brief, upon a future reading to the trial court, will undoubtedly be sufficient to warrant a dismissal of the pending action. The time and place to save the position of the Government, as it was and still is, in the District Court in Utah, is in the present litigation. And the continued existence of such action in Utah cries out the fact that the merger here approved is presently and today charged as being against the laws of the United States of America. California is entitled to proof upon these charges before it is called upon to take the merger of the two affected companies.

In terms of the national interest and in terms of the many instances of the clash and conflict between other federal agencies, the Justice Department, and the courts, it would seem to be more in the public interest to resolve this question presently, before the example of this case serves to encourage additional conflict lacking finality of resolution and before corporate assets, holdings, interests, and public

rights become inextricably intertwined, perhaps beyond recall, so that resolution, when it arrives in the future, may be meaningless.

III.

THE PROBLEMS OF COORDINATION AND ACCOMMODATION WERE PRESENTED TO THE COMMISSION AND CONSIDERED BY IT

It is said in the brief of respondent El Paso Natural Gas Company that the antitrust issue is not reviewable because it was not raised by California upon petition for rehearing. The fact that there was an antitrust suit pending has been an ever-present element in the development of this case (J. App., p. 1153). In its petition for rehearing California alleged that the Commission's disposition of the antitrust question was based on evidence not of record, and was erroneous to the extent that it held that *"an administrative agency can dispose of such an objection even as against later judicial determination."* (J. App., p. 1345) Furthermore, the petition alleged that the decision contained

> "* * * easily stated conclusions and generalities relating to * * * antitrust questions, all of which are offered unsupported by sufficient evidence and *under no standard or norm for a case like this.*" (J. App., p. 1350)

and that

> "* * * The merger was not sought to meet the public convenience and necessity, but, as the evidence shows, to frustrate action taken by the Department of Justice under Section 7 of the Clayton Act." (J. App., p. 1350)

The assignment of error was definite enough to give the Commission a chance to rule on it. Less than this has been held sufficient (*Natural Gas Pipeline Co. v. Federal Power Commission*, 120 F.2d 625, at 632 (1941)).

In the same vein (and with the same weight) El Paso urges that California's argument is designed to seek review not of the Commission order, but of the order of the Federal District Court continuing the antitrust action. The facts belie this.

On September 8, 1958, California filed with the Commission a Motion to Stay Proceedings pending resolution of the pending court action (J. App., pp. 1135-1145). It is interesting to note at this juncture that many of the same arguments made in our petition to this Court were there squarely and precisely presented to the Commission (J. App., pp. 1135, 1138, 1142-1145). On September 15, 1958, the Commission denied this motion (J. App., pp. 1147-1148).

Much is made of the fact that the District Court continued the action before it until the Commission had passed on El Paso's application. Yet it is important to note in this connection that the Court took this action only *after* the Commission had denied California's motion for stay (J. App., pp. 1176, 1177, 1178). This issue, therefore, is properly before this Court, seeking, as it does, review of the Commission's action in refusing to stay its proceedings pending a determination of the legality of El Paso's acquisition of Pacific's stock, and in deciding adversely upon California's contentions that these issues properly should first have been resolved by the federal judiciary.

IV.

ADMINISTRATIVE STANDARDS OF ETHICAL CONDUCT

The Federal Power Commission has adopted a rule of procedure applicable to practitioners before it which imposes upon such practitioners, lay or professional, the same standards of conduct required of lawyers. The Commission's Rule 1.4(a)(3) provides:

> "All persons appearing before the Commission or the presiding officer must conform to the standards of ethical conduct required of practitioners before the Courts of the United States • • • "

It is an elementary principle of legal ethics that attempts to exert personal influence upon a court fall short of the moral standards expected of lawyers. Indeed, even conduct which gives merely the appearance of such impropriety is frowned upon.

> "Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstruction of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor • • • "
>
> (Canon 3, Canons of Professional Ethics of the American Bar Association, adopted 1908 as amended through 1957.)

It will be noted that the Commission's rule of practice applies to all persons who practice before it, whether lay or professional. The expose of the Commission's problems in this area, indicates that one of the roots thereof is the fact that others than lawyers, unaccustomed to legal disciplines, are ignorant of the bounds of propriety in their contacts with members of the Federal Power Commission. Commissioner Stueck in his testimony before the Commission (reported at pp. 949-50, Committee transcript, see pp. 9, 10, App. "A") indicates this to be the case. He further testified that such persons, in their private discussions with members of the Commission, get "awfully close" to "business."

Respondents quite properly say that there is nothing in the record before the investigating congressional subcommittee which clearly shows that California's case was prejudiced by the private, informal contacts made by representatives of the regulated industries. Their view of the record is that it presents no substantial question of improper conduct.

This view is callous and erroneous.

So that the Court may assay the weight of this evidence, we have included as an appendix hereto selections from the testimony of Commissioner Kline, and the late Commissioner Stueck. This testimony clearly reveals that it cannot be said that there were never any discussions of the merits of pending cases. "Business", as the word is used in the testimony, is a shorthand expression meaning the merits of pending cases, and the evidence indicates that "business" was discussed! What "business", and when is not clear, but there is much in the record to raise the suspicion of improper conduct (See App. "A", pp. 2, 4, 7 and 11).

Affirmatively, the testimony indicates that the "public relations" representative of the Pacific Northwest Pipeline Company, Mr. Harrison Wimberly, sought to create an aura of good feeling. This, of course, is less than a legal advocate's presentation of his view of the merits of a pending case. But it *is* a persistent, insidious, eroding approach, against which the consumers of the State of California cannot contend.

Is it true that there is no legal defense against such presentations? This is more than mere socializing, such as a judge might be permitted to do with members of the bar! Here we have the members of an administrative agency, charged with the protection of public interests, exposed to

persistent approaches by members of the few large industries it is supposed to regulate in the public interest.

Contrary to respondent's assertions, California does not "insinuate" actual occasions of impropriety. We do, however, assert there were frequent occasions when the conduct of the representative of the Pacific Northwest Pipeline Company caused, justly or not, a strong suspicion of impropriety.

We ask only that the Federal Power Commission act to enforce its own rules. This state of affairs can be easily remedied by the simple process of inserting a memorandum for the record, upon each occasion when a private, informal contact occurs. If public records of these contacts are made from memoranda compiled at the time of the contact, exposure of this conduct to public scrutiny will end it.

In the instant case this has not been done. Therefore, California, with substantial cause for suspicion, is absolutely unable to determine whether it has obtained from the Commission a fair hearing. At the very least, this situation calls for remand to the Commission for reconsideration, and trial by a tribunal free from the insidious effects of private influence.

The importance of this issue is obvious and requires no further comment.

V.

THE SIGNIFICANCE OF THE PROBLEM OF PERSONAL CONDUCT

The question of administrative conduct has flared from time to time as one of the sore spots on the body politic. California was very definite in setting out in its petition for review those actions upon the part of industry representatives and Commissioners about which it complains. Cali-

fornia made no statement that such actions were demonstrably improper or that it could prove it was prejudiced thereby. But the very vice of such communications between industry spokesmen and public officers rests in the creation of suspicion. This Court is aware that a public officer assumes unto himself the duties of a trustee. Indeed, the standards incumbent upon public servants are higher than those incumbent upon the trustee of a private interest. Accordingly, no party should ever be in the position of wondering if damage or harm accrued from meetings or discussions held outside the record, in which references were made to the litigation at hand.

California now is in no position to make further inquiry concerning the precise details of what was said as between industry and the Commissioners. The investigation conducted into the activities of the Federal Power Commission did not pursue the El Paso merger case, but it did reveal to California for the first time the fact that there were meetings between representatives of the applicant corporations and Commissioners.

The subject of influences and persuasions advanced outside of the normal procedures of agency business has, in the recent past, developed sufficient notoriety as to invoke the interest of the Congress of the United States.[1] It has become the subject of comment in a special report to the President of the United States.[2] It has prompted concern

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1. Report of the Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce, House Report No. 2238, 86th Cong., 2d Sess., January 3, 1961.

2. "Much attention has recently been centered on efforts, unfortunately too frequently successful, to sway the judgment of the members of regulatory agencies by so-called *ex parte* approaches or arguments, *usually personalized*, made off the record in proceedings that should be decided on the record. The extent of these *ex parte* approaches has only partially been revealed. They come from various

upon the part of the executive branch of the government, and was the subject of comment in one of the presidential messages to the Congress.[3]

The real answer to the public's concern and its need for protection from such practices rests with this Court. The tortuous path of legislation and the expectations of meaningful legislation are things which can be speculated upon. The most effective deterrent of such practices which violate the rules of fair play in so momentous a case lies in disciplining those who transgress in this regard. Such a penalty imposed for such conduct is the most effective deterrent.

---

sources—the office of the President, members of the Congress, and the regulated industries. Some are made in good faith; others to further a personal desire regardless of the public interest. Many of them emanate from lawyers striving to press their clients' cause, indeed, one of the worst phases of this situation is the existence of groups of lawyers, concentrated in Washington itself, who implicitly hold out to clients that they have means of access to various regulatory agencies off the record that are more important than those that can be made on the record. ***These lawyers have generally previously held positions of more or less importance in the Government. The examination of the appointment diary of one of the present Commissioners gives strong inferential although not definitive proof of what these off-the-record approaches can imply.***

"Instances have also recently been uncovered of actual malfeasance in the sense of bribery among high administrative officials. ***More serious than these are the subtle but pervasive methods pursued by regulated industries to influence regulatory agencies by social favors, promises of later employment in the industry itself, and other similar means.***" (Report on Regulatory Agencies to the President-Elect, Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate, 86th Cong., 2d Sess., December 1960.)

3. Ethical Conduct in the Government, 107 Cong. R. 6454, H. Doc. No. 145.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

WILLIAM M. BENNETT
Chief Counsel of the Public Utilities Commission of the State of California and Special Counsel for the People of the State of California

PAUL M. HOGAN
Of Counsel

(Appendices Follow)

Appendix A

EXCERPTS FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE SPECIAL SUBCOMMITTEE ON LEGISLATIVE OVERSIGHT OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE.

To assist the Court in its appraisal of the admissions made by members of the Federal Power Commission before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, we reprint portions of the reporter's transcript of the hearings held before the Special Subcommittee.

Respondents say that the testimony of the Commissioners clearly established that they never discussed the merits of cases pending before the Commission. Upon one view of that testimony, if certain passages are emphasized, that assertion would appear to be so. But if the testimony is read, it is clear that it is often inconsistent, vague, and hedged about with qualifications. For example, there is the testimony of Commissioner Kline relating to his contacts with Mr. Harrison Wimberly, a public relations representative of the Pacific Northwest Pipeline Company:

> (443) "* * * Mr. Lishman. [Committee Counsel] On September 11, 1958 Mr. Wimberly called at your office.
>
> Mr. Kline. That is correct.
>
> Mr. Lishman. Do you recall what you discussed with him at that time?
>
> Mr. Kline. *No, I don't recall.* I might by going back through our files and seeing what matters Pacific Northwest had. If I might I might be able to see just what I did discuss with him. They had at that time pending a rate increase which had gone into effect February 5, 1958, and they on and off had applications, Pacific Northwest, that is, had applications for expansion of their lines at different times.

Mr. Lishman. Now, on November 14, 1959, did Mr. Wimberly call on you again.

Mr. Kline. That is correct.

Mr. Lishman. Do you recall what he discussed at that meeting?

(444) Mr. Kline. *No, I do not.* I might say as far as Mr. Wimberly is concerned, *I don't believe that he ever discussed any business matter with me on more than two or three occasions. Now that is not true of some of these other representatives who never came in except on business.*

But in his case, I don't *think* he ever, *except on two or three occasions did discuss business matters.* He just came in to visit.

Mr. Lishman. Now turning to 1959, February 2, did Mr. Wimberly call on you and do you recall what he discussed at that time?

Mr. Kline. *No, I am sorry, I do not.*

Mr. Lishman. On April 3, 1959 he called again.

Mr. Kline. I guess from seeing just that date on a piece of paper, *I cannot recall at all.*

Mr. Lishman. There is a press release of the Power Commission in April 1959 stating that the Commission had authorized El Paso to construct some facilities. Do you recall whether or not *on the February 2 visit* Mr. Wimberly discussed that matter with you?

Mr. Kline. No, I am certain he did not, because at that time El Paso and Pacific Northwest were not merged, *and I don't ever recall* him having discussed any El Paso matter with me.

Mr. Lishman. On April 3, Mr. Wimberly called on you again. (445) Do you recall what he discussed then?

Mr. Kline. *No, I do not.*

Mr. Lishman. Again on April 20?

Mr. Kline. *I do not recall what was discussed.*

Mr. Lishman. Again on May 29.

Mr. Kline. *I have no recollection then as to what was discussed.*

Mr. Lishman. Again on October 21. Do you recall what was discussed at that meeting?

Mr. Kline. *No, I have no recollection*, unless there was some—unless my memory might be refreshed through some press release or something of that nature • • •." (Emphasis added.)

How could Commissioner Kline be so certain that he never discussed the El Paso merger proceeding, when time after time he had to confess that he had no recollection of the matters discussed at the many meetings he had with Mr. Wimberly? How can respondents be so sure that the El Paso case was never discussed when reference to the entire context of this colloquy reveals that Commissioner Kline's answer referred only to the meeting of February 2? How can respondents be so sure that the merits of pending cases were never discussed when it is obvious from the above testimony that *business matters were discussed?*

Commissioner Kline admitted to other social contacts with Mr. Wimberly. He had golfing dates with Mr. Wimberly and a Mr. Clammer, who represented other pipe line interests. While golfing, "procedural" matters were discussed, such as whether certain people should be allowed to intervene in a pending case!

(467) "Mr. Kline. Well, I played golf once this year, I seem to be quite a golfer and yet I hardly ever play. I played once this year and that was with Mr. Clammer and Mr. Wimberly and I am sure one of those he just stopped in for a golf date.

On the other occasions they were doubtless about business. He [Mr. Clammer] represents a pipe line which is transporting oil—transports gas from Florida—from Texas to Florida, and they currently have under way an expansion program. *Now there has been a dispute as to whether certain people should be allowed to intervene in that case, and it seems to me that*

he may have been in to discuss matters, procedural matters in connection with that case. I do not ever recall having him discuss in any way any pipe line case with me, discuss the merits of any pipe line case with me or of any case whatsoever." (Emphasis added.)

Mr. Paul Kayser, President of the El Paso Natural Gas Company was seen several times by Commissioner Kline, at which times Kayser would frequently urge Kline to "expedite" cases. Such approaches are distinguished by Mr. Kline as being merely "procedural" and not getting to the merits of pending cases.

(467) "Mr. Lishman. Now, Mr. Kline, will you turn to page 10, please, of that document? Do you know a Mr. Paul Kayser?

Mr. Kline. That is true.

(468) Mr. Lishman. Will you please identify him for the record?

Mr. Kline. He is President of the El Paso Natural Gas Company.

Mr. Lishman. Is it correct he made some calls in your office, one in 1958 and four in 1959?

Mr. Kline. Yes, that is true.

Mr. Lishman. Do you recall what was discussed at any of those meetings?

Mr. Kline. Now, El Paso Natural Gas Company probably has fifty to a hundred matters pending before us at all times. Generally when or sometimes when Mr. Kayser is in town testifying in a case that is going on before an examiner he just drops in for two or three minutes to say hello, and I think that is all that ever happened on any of these occasions.

I have never had an extended conversation with Mr. Kayser, it has just been—I don't think I spent 30 minutes with him in all the time I have known him. He just drops in to say hello and that is about it.

Mr. Lishman. But at the, at no time did he discuss such matters as Commission action with respect to construction of facilities or purchase of gas?

Mr. Kline. *He has asked us to hurry some cases along,* in fact everybody is always asking us to do that and I don't doubt but what he did it.

Mr. Lishman. Did he ever discuss with you the examiner's opinion concerning the authorization of independents selling gas to El Paso?

Mr. Kline. Not *to my recollection.*

He did come in—well, now I am not certain it was Mr. Kayser or one of his representatives, when we were trying to get gas, now, authorize the construction of a pipe line from the Aneth Field in Utah down to El Paso's main line, they had a 26 million dollar construction project, and he and his attorneys were in—he or his attorneys, I don't know whether it was Kayser or not, were in a number of times, *trying to get that expedited.*

Mr. Lishman. But you never discussed the merits of the case with him?

Mr. Kline. I have never discussed the merits of the case *that I recall,* with Mr. Kayser." (Emphasis added.)

In addition to the many "business" visits which Mr. Kline testified to having with Mr. Wimberly, he also recalls occasions where he has visited the home of the public relations representative of the Pacific Northwest Pipeline Company.

(522) "Mr. Lishman. On the dates mentioned do you recall whether (523) or not you had occasion to attend a dinner party given by Mr. Wimberly?

Mr. Kline. Well, now, I don't believe—I believe I testified to attending a dinner party, but I don't believe I testified to attending one at that time. I believe the dinner party I attended was, I got to thinking about it, was in February.

I think that is when his daughter was, an announcement of her marriage was made, and I am positive that

I didn't attend a party, I know it wasn't a dinner party and I don't believe we were over for cocktails or anything during the Christmas season. It is possible we could have been but I don't believe so.

Mr. Lishman. Do you recall any social event you might have attended during those days that have been mentioned, December 26, 27, 28?

Mr. Kline. Yes, I am certain that I was between Christmas and New Year's, there is almost always a cocktail party or two somewhere and I am certain I attended some of them.

Mr. Lishman. But you don't recall any special occasion.

Mr. Kline. No, I don't * * *."

Most revealing of all Commissioner Kline's testimony relating to such informal, "off-the-record" contacts, is his testimony relating to his views on the necessity for it. After stating the Commission staff's inability to give answers or to take action on certain questions, Mr. Kline states that such contacts are perfectly legitimate calls for perfectly legitimate business reasons. He justifies these calls upon the ground that the Commission has to get both sides of the case! But what of the interests of sovereign states defending the interests of their consumers?

(523) "Mr. Lishman. Well, now, Mr. Kline, many of these calls that you had were with either former Commissioners or former employees of the Commission, and attorneys, and so forth, men apparently versed in the practice before the Commission, and do you know any good reason why they should call on you for matters not connected with the merits where they could have obtained the information probably just as well from members of the staff?

Mr. Kline. Well, now they probably could have obtained most of this information from the staff, but

our staff sometimes does not give what these attorneys feel are satisfactory answers.

They tell them, this case they just can't get to it, and when the request is made to expedite a case, the staff will often give an answer 'We won't be able to set that down for two or three months. We have other matters that are pending,' and then is when they come to us and ask us to set it down.

Now, I will say this, as to these calls generally, this looks like a great number of calls but when you figure that we are representing—that we are regulating three or four thousand independent producers and pipe line companies, and they have thousands of matters pending before us every year, it is only on the exceptional case where they feel their case is being neglected that we get a phone call or request to expedite or request to set the case down.

Now in many of these calls the staff can't take action, where they ask to waive the intermediate decision procedure, where they ask to expedite the time for filing exceptions, there are numerous matters that the staff has no jurisdiction over, and that all they can do is send them to us, and I will say this, if these calls, *I think that practically every one listed here would be a perfectly legitimate call for a perfectly legitimate business reason and we have to get both sides of the case.* On the ordinary case we get a memorandum from the staff which gives their viewpoint.

Now often that is prepared by a man who has never seen an oil field or never seen a pipe line, and while he does his best a man in the office of Washington sometimes doesn't appreciate the fact that it is vital that a gas well be connected up, and that is why they come to us and point that out a *little more directly.*" (Emphasis added.)

While it may well be true, as respondents assert, that California is unable to point to any specific part of the record which shows that a specific contact with any of the

Commissioners resulted in a discussion of the El Paso-Pacific Northwest merger case, which resulted in prejudicing California's case, there is testimony in this record which clearly indicates that the consumers of the State of California were faced with a much more subtle, erosive attack upon the integrity of the Commission.

The late Commissioner Stueck characterizes Mr. Harrison Wimberly as a public relations representative of Pacific Northwest. Mr. Stueck's testimony reveals that Mr. Wimberly was busily engaged in creating an aura of "good feeling" on the part of the Commissioners to his client.

(851) "Mr. Lishman. Will—is Mr. Wimberly a former Commissioner?

Mr. Stueck. Yes, sir.

Mr. Lishman. Is it correct that at one time he represented Pacific Northwest Pipeline?

Mr. Stueck. Yes, sir, I think he still does.

Mr. Lishman. Which was merged into El Paso?

Mr. Stueck. Yes, sir.

Mr. Lishman. Is it correct that at on or about April 20th there were matters pending before the Commission pertaining to the Pacific Northwest Pipeline Company?

Mr. Stueck. Yes, sir.

Mr. Lishman. And also pertaining to El Paso?

Mr. Stueck. Yes, sir.

Mr. Lishman. And some of those matters are—what you would call the adjudicatory status?

Mr. Stueck. Yes, sir.

Mr. Lishman. And some of these matters are correctly set forth on page 11?

(852) Mr. Stueck. The minute entries reflected on that page I have checked and they are correct.

Mr. Lishman. Now, when Mr. Wimberly called on you on April 20th, did you discuss any of these matters with him?

Mr. Stueck. No, sir, I have never discussed any litigated matter with Mr. Wimberly.

Mr. Lishman. Do you recall what you did discuss with him?

Mr. Stueck. *Mr. Wimberly comes in to pay a social call more or less. Frequently, he may have a new story to tell. Occasionally, the need for expedition, or the need for handling of matters, because of drainage of gas wells, for instance, or something like that, may be mentioned but he has never discussed any litigated pending case.*

Mr. Lishman. Well, is it correct that Mr. Wimberly is not an attorney?

Mr. Stueck. He is not an attorney. He is a newspaperman, I think.

Mr Lishman. In other words, *would you consider him to be acting more or less as a public relations man?*

Mr. Stueck. Yes sir.

Mr. Lishman. *For Pacific Northwest and El Paso?*

Mr. Stueck. Yes, sir.

Mr. Lishman. *Would the kind of discussions you have with him been in that area rather than in the area of adjudicated matters?*

Mr. Stueck. Yes, sir." (Emphasis added.)

Considering the testimony related to the Subcommittee by Commissioners Kline and Stueck, respondents persistently emphasize that no presentations were made upon the merits of pending cases. Respondents point to the numerous statements made by Mr. Kline and Mr. Stueck to the effect that representatives of the regulated industries merely discussed questions of expediting cases, "of hurrying them along."

The difficulty with this position is, of course, that when questions of expediting are concerned it is virtually impossible to ignore the facts and circumstances surrounding the substantive questions involved in the cases pending before the Commission. This fact is vividly exemplified in the following testimony of Commissioner Stueck:

(947) " Mr. Mack, Why do they inquire from you? Why do they contact you to find out about the status of a case?

Mr. Stueck. Well, I have in mind this matter that I mentioned this morning, in which an old producing area is being taken over from Hope Natural Gas by the Columbia system, to be used as a storage area. Time is of the essence in that case, because they will have to prepare that area for storage in order that as quickly as the winter demand is on the line ceases from the customers themselves, and they can begin putting that gas into the storage field to have it available by next fall when again the customers need to heat their homes.

Mr. Mack. Then this is going a little farther than just to inquire about the status of a case, is it not?

And it does get into a discussion of certain circumstances.

Mr. Stueck. Well, there are borderlines. As to where you draw the line—

Mr. Mack. Yes. I have been convinced that there are certainly borderline cases, and I wonder how you—how and where you draw the line, and how you can say that some of these cases, in fact as I understand it, all of them, except the Midwestern case, they stopped short of the line that would be discussing the merits of the case?

Mr. Stueck. *Well, I think sometimes they get right on the line.*

Mr. Mack. Wouldn't you think that most of these concerns, if they were sincerely interested in knowing the status of any case that they would just sit down and write a letter to the Chairman of the Commission or the appropriate person instead of—

Mr. Stueck. I guess they could do it that way. I think, in terms of a company president, who is facing a board of directors meeting or an annual stockholders' meeting, and matters have been hanging fire with the Commission for a considerable length of time, and they

could be pretty abrupt in wanting to know why no action has been forthcoming and what this president has done about getting some action on the thing and if he says, 'Well I wrote a letter,' I am not sure that this—

Mr. Mack. Well, now, that is exactly my point. He is going to report to the Board of Directors that he spent $500 coming down to Washington and spent several days calling on each of the Commissioners personally concerning this matter, and that will impress the directors, I am sure, but some economy minded individual in the corporation might very well ask 'Why didn't you write a letter? If all the purposes of the trip was to determine the status of the case,' so they must want something more than that.

Mr. Stueck. Well, I don't know what they want.

Mr. Mack. Do you think if they wanted to know the status of the case, they could accomplish the same thing in a letter?

Mr. Stueck. I think they not only want to know the status of the case but see what can be done about getting the cases concluded and out of there.

Mr. Mack. *Then they get into discussing the merits of the case.*

Mr. Stueck. *Not necessarily.*

Mr. Mack. *Well, they are getting awfully close to discussing the merits of the case.*

Mr. Stueck. *I think so sometimes.*" (Emphasis added.)

Appendix B

The New York Times, Issue of April 14, 1961

MERGER DECISIONS FROM U. S. DIFFER

Reserve Approves a Deal in Boston to Which Justice Department Objects

Special to The New York Times

WASHINGTON, April 14—The Federal Reserve Board has approved a proposed Boston bank merger to which the Department of Justice objected on grounds of its effect on competition.

On the surface this is comparable to the situation that led to a recent controversial pact between the Justice and Treasury Departments, wherein the Controller of the Currency is holding up his approval of mergers to which the Department of Justice objects. The pact was made after the Department of Justice had gone to court to stop two mergers—in Philadelphia and Lexington, Ky.—that the Controller had approved.

[In New York, Bankers Trust Company asked for and obtained indefinite postponement of a Federal Reserve Board hearing on its application to join with the County Trust Company of White Plains in a new holding company. The hearing was to have begun April 25 at the Federal Reserve Bank of New York. In making the request, Bankers Trust said it wanted to consider the effect of a State Banking Board decision Thursday turning down the holding company proposal.]

It appears, however, that the Boston case is not comparable, because the Department of Justice's objection was not so strong as in the other cases.

The Boston merger involves State Street Trust Company and Rockland-Atlas National Bank. The Federal Reserve has authority over this merger because the surviving bank would be a state bank and a member of the Federal Reserve System. The controller's authority is over national banks. State banks, which are not members of the system, come under the Federal Deposit Insurance Corporation. The Department of Justice has an advisory role to all of them.

Robert F. Kennedy, Attorney General, said at a press conference last week that he was seeking agreements with the Federal Reserve and the F. D. I. C. similar to the one with the Controller.

The agreement with the controller has drawn no public challenge so far, but it would not surprise officials here if it did. There is general agreement that a sloppy situation had developed, where mergers were being approved by one agency of the Government and quickly knocked down by another. Those who object to the Justice-Treasury-Controller pact hold, however, that the law gives the Controller the authority and the duty to rule.